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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 582

EUGENE E. CORDAK, D/B/A A B DENTAL PLATE LABORATORY AND ANTHONY J. VOLINO, D/B/A GRAND & ASHLAND DENTAL LABORATORY,

Appellants,

vs.

THE REUBEN H. DONNELLEY CORPORATION, AN ILLINOIS CORPORATION, *Appellee,*

AND

PEOPLE OF THE STATE OF ILLINOIS, EX REL., ILLINOIS STATE DENTAL SOCIETY, AN ILLINOIS CORPORATION NOT FOR PROFIT, JAMES C. DONELAN, PAUL W. CLOPPER AND JOSEPH B. ZIELINSKI, INDIVIDUALLY AND AS OFFICERS OF THE ILLINOIS STATE DENTAL SOCIETY, AND ROBERT J. POLLOCK, HERMAN R. WENGER, JOSEPH T. BROPHY, ARTHUR M. DUXLER AND FREDERICK D. MOORE, INDIVIDUALLY AND AS MEMBERS OF THE JOINT COMMISSION ON LEGISLATION AND LAW ENFORCEMENT OF ILLINOIS STATE DENTAL SOCIETY, *Intervenors-Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION BY APPELLEES TO DISMISS APPEAL OR TO AFFIRM JUDGMENT.

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Intervenors-Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION BY APPELLEES TO DISMISS APPEAL OR TO AFFIRM JUDGMENT.

May It Please The Court:

Now come People of the State of Illinois, ex rel. Illinois State Dental Society, et al., Appellees, by their attorneys,

Owen Rali and John R. Porter, and move that the appeal in the above entitled cause be dismissed or, in the alternative, that the judgment of the Supreme Court of Illinois be affirmed, for the reason that the appeal does not present a substantial Federal question.

I.

THE FEDERAL QUESTION WAS PROPERLY PRESERVED.

While the Appellants properly preserved their contention as to the unconstitutionality of the 1959 amendment to Section 5a of the Illinois Dental Practice Act, under the Federal Constitution, we contend that no substantial Federal question is here presented in view of the prior decisions of this court substaining the validity of similar statutes under which the police power of a state has been exercised to protect public health. Hence, we make the above motion.

II.

FACTS RELEVANT TO THE APPEAL SHOW THIS STATUTE TO BE A PROPER PUBLIC HEALTH MEASURE.

Protection of public health by reasonable exercise of the police power of the state is the fundamental premise of the Illinois Dental Practice Act. The Act follows a time-tested and almost universally recognized pattern of subjecting a profession to licensing and regulation because the services rendered by the dental profession so directly relate to the health and welfare of the people that regulation is deemed necessary to protect the public health.

Unlike legislation dealing with ordinary trades, the statute in question places responsibility squarely on the dental profession and at the same time, in the public interest, assures the maintenance of a strong profession by protecting the dental profession from commercialization and exploitation.

The Chicago Red Book classified telephone directory (commonly referred to as the "Chicago Red Book") is what its name implies, a telephone directory in which listings and advertising are carried under certain classifications, one of which is that of "Dental Laboratories". This directory is provided to all telephone subscribers and is used by the public generally. The advertisment of Appellant Cordak is shown at the top of column three of one of the pages from the 1960 edition of the Chicago Red Book (9th page of telephone directory exhibits in the Record) under the name A B Dental Plate Laboratory, and that of Appellant Volino is shown at the top of the fourth column of a similar page from the 1960 Chicago Red Book, under the name of Grand & Ashland Dental Laboratory (10th page of telephone directory exhibits in the Record).

Appellants concede that the State of Illinois may prohibit dental laboratory technicians from advertising their goods and services to the public but refuse to recognize that the Chicago Red Book, which admittedly is circulated among the public, is an instrumentality which calls attention of the public to their business. Appellants also refuse to recognize the public health aspects of prosthetic dentistry and the advertising thereof to the public, and they further refuse to recognize that ample provision is made in the Illinois Dental Practice Act for their advertising directly to their only lawful customers—members of the dental profession. The validity of the 1959 amendment to Section 5a of the Illinois Dental Practice Act is here challenged because Appellants desire to continue display advertising in a medium that reaches the public.

(a) Statutory Prohibition of This Kind of Advertising Was Upheld by the Supreme Court of Illinois in 1956 and Review Was Denied by This Court.

In *People ex rel. Chicago Dental Society* v. *A. A. A. Dental Laboratories*, 8 Ill. 2d 330, 134 N. E. 2d 285 (1956), the court stated, at page 335:

> "Advertising by dentists is severely restricted. The record in this case shows that many of the defendant technicians have by persistent and blatant advertising sought to deal directly with the public, and that control of dental patronage has thus come into the hands of laboratory technicians who have directed it to such dentists as they saw fit. Prohibition of direct dealing between the makers of dentures and the public may thus be thought desirable to avoid the danger that the profession of dentistry may become 'subservient to the business of those engaged in the making of plates.' *Lasdon* v. *Hallihan*, 377 Ill. 187, 195."

And at page 338:

> "Defendants also attack the validity of sections 5(a) and 18(b) of the act (Ill. Rev. Stat. 1955, chap. 91, pars. 60(a), 72(b), which limit the type of advertising which may be done by those who are subject to the act. The objection is not directed to any of the specific restrictions which the act contains. Rather it appears to be based upon the assumption that the General Assembly is without power to restrict in any way the advertising of dental laboratory technicians. The contrary has been squarely held. *Lasdon* v. *Hallihan*, 377 Ill. 187, 194; *Winberry* v. *Hallihan*, 361 Ill. 121; see also *Perlow* v. *Board of Dental Examiners*, 332 Mass. 682, 127 N. E. 2d 306; cf. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483; *Klein* v. *Department of Registration and Education*, 412 Ill. 75; *Roberts Optical Co.* v. *Department of Registration and Education*, 4 Ill. 2d 290."

Review of the above cited *Chicago Dental Society* case was

denied by this court on October 15, 1956, 352 U. S. 863, and petition for rehearing was denied on November 19, 1956, 352 U. S. 919.

The Supreme Court of Illinois said in its opinion in the instant case (appellants' Jurisdictional Statement, p. 17; *Cordak* v. *Reuben H. Donnelley Corp.*, 20 Ill. 2d 153, 160, 169 N. E. 2d 321, 324 [1960]):

> "In our opinion, the decision of this court in *People ex rel. Chicago Dental Society* v. *A. A. A. Dental Laboratories, Inc.*, 8 Ill. 2d 330, 134 N. E. 2d 285, and the cases discussed therein are conclusive as to this case. In the *A. A. A. Dental Laboratories* case the validity of the section limiting the advertising was directly challenged. In that case we specifically held that certain defendant dental laboratory technicians were properly enjoined from advertising in telephone directories, by window posters, and by public display of specimen dentures and from dealing directly with the public." * * *

And also stated (Appellants' Jurisdictional Statement, p. 18):

> "We have carefully examined the evidence introduced in this case, particularly the two and one-half pages from the Chicago Red Book containing the advertising of dental laboratories. It is apparent that the display advertising here in issue is substantially of the same size and content and nature as was in issue as to numerous defendant laboratories in the *A. A. A. Dental Laboratories* case."

(b) The 1959 Amendment to Section 5a of the Illinois Dental Practice Act Was Reasonably Necessary to Bring About Compliance With the Previous Court Decisions.

Despite the decision of the Supreme Court of Illinois in 1956 in the *Chicago Dental Society* case, certain dental laboratories continued to purchase display advertising in the Chicago Red Book. As stated by Appellants, in all

poration accepted for publication in the Chicago Red Book issues prior to that of 1960, The Reuben H. Donnelley Corthe announcements contracted for by dental laboratory technicians (Appellants' Jurisdictional Statement, p. 4).

For this reason, the General Assembly of Illinois, in 1959, amended Section 5a of the Illinois Dental Practice Act by placing a specific limitation on the content of announcements which dental laboratories could make in business and telephone directories, as follows:

> "Announcements in business and telephone directories shall be limited to name, address and telephone number, and shall not occupy more than the number of lines necessary to disclose such information". (Ill. Rev. Stats., 1959, Ch. 91, Par. 60a; Appellants' Jurisdictional Statement, Appendix "C", p. 24).

The question is whether the above amendment was a reasonable exercise of the police power of the State for the protection of public health and welfare. Appellants seem to contend that the amendment has no reasonable relation to the protection of public health.

The answer to this argument is found in the opinion of the Supreme Court of Illinois in this case, as follows:

> "The fact that plaintiffs are seeking to force the publisher of the classified telephone directory to accept display advertising of substantially the same size and content as was involved in the prior case, subsequent to the decision therein, is a rather clear and convincing demonstration that the General Assembly in 1959 had a reasonable basis for enacting the amendment in question." (Appellants' Jurisdictional Statement, Appendix "A", p. 18.)

(c) There Is No Evidence That Appellants Tried to Advertise in Trade Journals and Professional Publications Circulated Among Their Only Legitimate Customers—Licensed Dentists.

Under Section 5a of the Illinois Dental Practice Act, the only lawful market for the goods and services of a dental laboratory is the dental profession itself. It is only when the laboratory does its work "exclusively, directly, and solely for licensed members of the dental profession, and not for the public or any part thereof", that the laboratory shall not be deemed or considered to be practicing dentistry within the meaning of the Act. (Appellants' Jurisdictional Statement, p. 24.)

Yet, no evidence was offered by Appellants to show that they advertised in any trade journal or professional publication. They seek to force their way into a directory that is given general circulation among the public. This would clearly indicate that their target is the general public and not the dental profession.

Since the Illinois statute prohibits dental laboratories from dealing directly with the public but permits them to deal only with the dental profession, it is only reasonable and proper that the advertising by dental laboratories should be limited largely to those professional publications which circulate among licensed dentists. Certainly it is not unreasonable to prohibit a person from advertising his services among those persons, the general public, with whom he is not lawfully permitted to do business.

Advertising by laymen to the public for dental patronage enables the advertiser to steer such patronage to dentists of his own choice or to attempt to render the dental service himself and in either case the effect is detrimental to public health.

The usual dentist-patient relationship cannot exist if the dentist is subservient to a commercial advertiser for obtaining his practice. He would be compelled to accept as little or as much business as the laboratory owner desired to give him. Professional responsibility would be destroyed. This undesirable result is one which the State of Illinois properly seeks to prevent by the statutory provision here challenged.

III.

THE FEDERAL QUESTION HEREIN IS NOT A SUBSTANTIAL ONE.

The Appellants have misstated the effect of the Illinois Statute, have relied upon cases involving ordinances or statutes not relating to the field of public health, and have failed to distinguish cases in this court which sustained the Illinois statute here involved as a public health measure well within the legislative competence of the State of Illinois.

(a) The Illinois Dental Practice Act Carefully Safeguards the Rights of Dental Laboratory Technicians to Advertise Their Goods and Services to Their Only Lawful Customers—Licensed Dentists.

Section 5a of the Illinois Dental Practice Act (Ill. Rev. Stats., 1959, Chap. 91, Par. 60(a)), very carefully protects the right of dental laboratories to advertise their products and services to their only lawful customers, licensed dentists.

First, there is an absolute prohibition against any kind of advertising. Referring to dental laboratories that deal only with licensed dentists it is provided:

> "However, it is unlawful for persons, firms or corporations so employed or engaged, to advertise *in any manner* the appliances constructed or repaired, or the services rendered in the construction, repair or alteration thereof * * *." (Emphasis ours.)

There follow certain exceptions to this prohibition. First it is provided that such persons, firms, or corporations:

> "* * * may announce in trade journals and professional publications which circulate among members of the dental profession, their names, the locations or places of their business, their office hours, telephone numbers, and the fact that they are engaged in the construction, reproduction or repair of such appliances, together with such display advertisements as disclose the character and application of their work, and persons, firms or corporations so employed or engaged may furnish to licensed dentists information regarding their products, materials, uses and prices therefor."

Certainly this gives dental laboratories a wide range of advertising possibilities among their lawful customers. It includes all types of direct mail solicitation, circulars, calendars, memorandum pads, display advertising in dental society journals, et cetera.

There is no contention by appellants that this part of the statute is too restrictive or unreasonable. In fact, appellants make no mention of it.

The statute also contains other exceptions to the advertising prohibition. It provides:

> "Announcement may also be made by business card, in business and telephone directories, and by signs located upon the premises wherein the place of business is situated * * *."

There follow certain limitations upon the size and character of such announcements. They must not contain any amount as to prices or fees. They must not contain pictures of the human head, mouth or specimen denture, "*or any other media calling attention of the public to their business.*" (Emphasis ours.)

It is at this point that the 1959 amendment was added, restricting announcements in business and telephone directories to name, address, and telephone number.

Appellants agree that the legislative purpose is to prohibit advertising which offers services to the public. (Appellants' Jurisdictional Statement, p. 6). Also, Appellants do not challenge the power of the General Assembly to prohibit advertising by dental laboratories to the public. (See opinion of the Supreme Court of Illinois—Appellants' Jurisdictional Statement, p. 16.) It is only logical that such power would carry with it the right to define what is intended to be prohibited.

It is well to note that Appellants have not even elleged that their advertising is directed to licensed dentists only and not to the public. In fact, Appellants amended their Complaint by striking out such allegations. This is of the utmost significance in this case. If Appellants' advertising is directed only to the dental profession, why did they amend their Complaint as above indicated?

Appellants argue that their advertising might contain words such as "Serving The Dental Profession Only" and that such announcement cannot be characterized as one directed at the public. (Appellants' Jurisdictional Statement, p. 7.) A large number of the advertisements of the 34 original defendants in *People ex rel. Chicago Dental Society et al.* v. *A. A. A. Dental Laboratories, Inc., et al.*, 8 Ill. 2d 330, contained the same or similar language. The Supreme Court of Illinois rightly held that such statements in dental laboratory advertising do not purify what would otherwise be an unlawful advertisment.

Appellants suggest that other classifications of advertising in a telephone directory are pointed to limited audiences and mention hospital supplies, dental equipment and druggists. (Appellants' Jurisdictional Statement, p. 8.) The analogy is not sound. No law prevents a layman from purchasing a hospital bed, a dental chair or many things which are sold in drug stores. But when a layman tries to *use* such equipment in practicing medicine, dentistry, or

pharmacy directly with the public without being licensed to do so, and, in addition, advertises his services to the public, he then violates public health laws similar to the statute here in question.

Since Section 5a of the Illinois Dental Practice Act makes ample provision for dental laboratories to advertise their products and services to their only lawful customers, licensed dentists, we respectfully submit that the amendment to Section 5a here in question does not impair the freedom of speech of Appellants and does not in any way close the door to a great variety of advertising media in which Appellants can reach their legitimate market. It places restrictions only in limited areas as determined by the General Assembly to be in the interests of public health and welfare.

(b) The Previous Opinions of This Court Eliminate Any Substantial Federal Question in the Present Case.

The argument by Appellants that Section 5a of the Illinois Dental Practice Act, as amended in 1959, impairs their freedom of speech, and that it deprives them of due process of law and equal protection of the law, presents now no substantial Federal question in view of an unbroken line of cases decided by this Court on similar and related statutes.

Semler v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935): Oregon dental practice act which prohibits certain types of advertising by dentists held not violative of the Federal Constitution.

The Court, by Mr. Chief Justice Hughes, said (p. 611):

> "That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board,

is not open to dispute. *Douglas* v. *Noble*, 261 U. S. 165; *Graves* v. *Minnesota*, 272 U. S. 425. The State may thus afford protection against ignorance, incapacity and imposition. *Dent* v. *West Virginia*, 129 U. S. 114; *Graves* v. *Minnesota*, *supra*."

The Court said further (p. 612):

"The community is concerned with the maintenance of professional standards * * * the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

Barsky v. *Board of Regents of New York*, 347 U. S. 442 (1954): The State may constitutionally provide for the suspension of a physician's license because of his conviction in a foreign jurisdiction for an offense not involving moral turpitude and not criminal under the law of the State.

The Court said (p. 449):

"It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of the state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health."

Williamson v. *Lee Optical Co. of Oklahoma*, 348 U. S. 483 (1955): It is not unconstitutional for the State to require the written prescription of a licensed opthalmalogist or optometrist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances. Nor is it unconstitutional to subject opticians to a regulatory system and to exempt therefrom all sellers of ready-to-wear glasses. It is not unconstitutional to make unlawful the solicitation of the sale of frames, mountings,

or any other optical appliances. Lastly, the provision of the Oklahoma Act is not unconstitutional in prohibiting a retailer of merchandise dealing with the general public from renting space, subleasing departments, or otherwise permitting any person purporting to do eye examination or visual care to occupy space in such retail store.

The Court, by Mr. Justice Douglas, said (p. 487):

> "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."

The Court said further (p. 488):

> "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought."

Amsel v. *Brooks*, 348 U. S. 880 (1954):

> "Per curiam: The appeal is dismissed for the want of a substantial Federal question."

This case below is reported in 141 Conn. 288, 106 A. 2d 152 (1954).

In the *Amsel* case the statutory definition of the practice of dentistry was almost identical with that contained in the Illinois Dental Practice Act. The Connecticut statute prohibited all direct dealing with the public. Its validity was challenged on the ground that it constituted an uncontrolled and arbitrary interference with the dental laboratory's right to carry on a lawful business, in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution.

Under the Connecticut statute the forbidden acts include delivery of a dental appliance to anyone but the dentist under whose supervision the work was done.

The Connecticut Supreme Court of Errors held (106 A. 2d 157):

> "No one has an inalienable right to pursue a profession or vocation which requires special knowledge or peculiar skill and is therefore a proper subject for supervision in the interest of the public welfare."

The Connecticut court held the statutory intent to be clear, that the acts in question were prohibited to a layman unless under the supervision and with the approval of a licensed dentist, and that this was not an unreasonable or arbitrary exercise of police power. As stated, this court dismissed an appeal in the *Amsel* case for want of a substantial Federal question.

People ex rel. Chicago Dental Society v. *A. A. A. Dental Laboratories, Inc.*, 352 U. S. 863 (1956):

> "Per curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial Federal question." (Rehearing denied, 352 U. S. 919.)

This case below is reported in 8 Ill. 2d 330, 134 N. E. 2d 285 (1956).

In the *Chicago Dental Society* case, the validity of Section 5a of the Illinois Dental Practice Act as it applied to display advertising by dental laboratories in the Chicago Red Book was challenged as depriving the dental laboratory Appellants of due process of law and equal protection of law.

Appellants there contended that although one of the laboratory technicians by the name of Dorner was shown to have had display advertising in the Chicago Red Book, his advertising was directed to the dental profession and

that there was no evidence that he dealt directly with the public, and therefore he should not be enjoined.

This same argument is made in the instant case (Appellants' Jurisdictional Statement, p. 7). The Supreme Court of Illinois held, as to Dorner, at page 339:

> "While there is no evidence showing that this defendant dealt directly with the public, his advertising activities clearly show a purpose to do so, and in our opinion justify a decree restraining him from dealing directly with the public. The decree, so far as it relates to Dorner's advertising, and insofar as it fails to enjoin him from dealing directly with the public, is erroneous."

The same was held as to three other defendants, including one whose Red Book advertisement consisted of only four lines, three of which comprised the name, address and telephone number, and the fourth line consisted of the words: "Repairing—One Hour Service".

The Supreme Court of Illinois held that such advertising was directed to the public and indicated an intention to deal with the public. Appellants here seek to publish advertisements which exceed in both size and copy some of the advertising of defendant laboratories in the *Chicago Dental Society* case.

The basic approach to the questions here raised by Appellants was stated by the Supreme Court of Illinois in the *Chicago Dental Society* case, as follows, at page 334:

> "We emphasize at the outset that decision does not depend on our appraisal of the wisdom of the enactment, and that 'it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.' (*Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487). That we might regard certain provisions as unnecessary is immaterial if they can be said to be reasonably related to a legitimate legislative concern."

As stated, this court dismissed an appeal in the *Chicago Dental Society* case for want of a substantial Federal question.

CONCLUSION.

Since the present case involves statutory regulation by a state of a profession directly related to public health, which regulation has been held by the Supreme Court of that state to be reasonable and in the public interest, and in view of the prior decisions of this Court, referred to above, it is evident that no substantial Federal question is involved and this appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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